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Employer Liability for Sex Harassment Through the Lens of Restorative Justice

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EMPLOYER LIABILITY FOR SEX HARASSMENT THROUGH THE LENS OF RESTORATIVE JUSTICE

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ABSTRACT

Title VII cases alleging sex harassment have become almost completely deferential to employers who have anti-harassment policies. In this Note, I discuss legal and sociological influences on this development and propose using restorative justice focused mediation to avoid rendering Title VII entirely ineffective. Mediation should only be compelled as a remedy—after a court finds that harassment occurred, but that the plaintiff cannot prove her employer knew about the harassment. Instead of dismissing these cases—where judges have already found illegal discrimination—some corrective action should be imposed on the employer for its failure to maintain a harassment-free workplace. Focusing mediation on principles of restorative justice makes the parties likely to understand and respond to each other's points of view. Harassers who understand how harassment harms their victims will be more receptive to changing their behavior than if they were punished without explanation. Employers that understand the effect of harassment on their employees will feel a stronger responsibility to actively monitor their workplaces for unacceptable conduct.

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I. INTRODUCTION

> Senator Simpson: But let me tell you, if what you say this man said to you occurred . . . , why in God's name would you ever speak to a man like that the rest of your life?[1]
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> Anita Hill: That is a very good question, and I am sure that I cannot answer that to your satisfaction. . . . I was afraid . . . this response, this kind of response, is not atypical, and I can't explain. It takes an expert in psychology

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1 *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 128 (1991) [hereinafter *Thomas Nomination Hearings*] (statement of Sen. Alan Simpson).

> to explain how that can happen, but it can happen, because it happened to me.[2]

Anita Hill's testimony was hailed by her supporters in 1991 as a turning point in how the nation would understand sex-based harassment.[3] A record number of women ran for and were elected to Congress, earning 1992 the nickname the "Year of the Woman."[4] The following years saw more milestones for gender equality. Women finally served as Secretary of State and Speaker of the House.[5] Congress enacted the Lily Ledbetter Fair Pay Act after a demoralizing Supreme Court decision and an inspirational dissent.[6] Women can now serve in combat.[7] A woman finally received

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2 *Id.* (testimony of Anita F. Hill).

3 Fresh Air, *For Years, Anita Hill Was a 'Canary in the Coal Mine' for Women Speaking Out*, NPR, at 1:46 (Nov. 30, 2017), https://www.npr.org/transcripts/567430106 [https://perma.cc/2F8X-TK2Z]. I'm using "sex harassment" or "sex-based" harassment, as it tends to be more descriptive of the harassment many women face. "Sexual harassment" tends to imply some type of sexual motive, although the motive is often gender hierarchy and status. *See* Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 20–22 (2008); Lauren B. Edelman & Jessica Cabrera, *Sex-Based Harassment and Symbolic Compliance*, 16 ANN. REV. L. & SOC. SCI. 361, 363–65 (2020).

4 Many people link this rise in political activism directly to how the all-white, all-male Senate Judiciary Committee treated Professor Hill during the Thomas nomination hearings. *See, e.g.*, Michael S. Rosenwald, *No Women Served on the Senate Judiciary Committee in 1991. The Ugly Anita Hill Hearings Changed That.*, WASH. POST (Sept. 18, 2018), https://www.washingtonpost.com/history/2018/09/18/no-women-served-senate-judiciary-committee-ugly-anita-hill-hearings-changed-that/ [https://perma.cc/D5F3-G85Q]; Alix Strauss, *Key Moments Since 1992, 'The Year of the Woman,'* N.Y. TIMES (Apr. 2, 2017), https://www.nytimes.com/interactive/2017/04/02/us/02timeline-listy.html [https://perma.cc/9J9V-CLBZ].

5 Strauss, *supra* note 4.

6 Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting) (calling on Congress to overturn the Court's "parsimonious reading of Title VII"). A year and a half after the Court's decision, Congress passed the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 1, 123 Stat. 5 (codified as amended at 42 U.S.C. § 2000e-5(e)(3)).

7 A five-year analysis of the 2015 decision to allow women in combat found that women are slowly trickling into the military in increasing numbers. Emma Moore, *Women in Combat: Five-Year Status Update*, CTR. FOR A NEW AM. SEC. (Mar. 31, 2020), https://www.cnas.org/publications/commentary/women-in-combat-five-year-status-update [https://perma.cc/UQ26-ZRNR]. However, the integration of women in combat roles was particularly slow, and even faced opposition in the Marine Corps, who sought to be exempted from the policy. *Id.* Whether the decision to allow women in combat was the right one remains controversial. *Compare* Heather Mac Donald, Opinion, *Women Don't Belong in Combat Units*, WALL ST. J. (Jan. 16, 2019), https://www.wsj.com/articles/women-dont-belong-in-combat-units-11547411638 [https://perma.cc/TS3N-X8JZ] ("The Obama-era policy of integrating women into ground combat units is a misguided social experiment that threatens military readiness and wastes resources in the service of a political agenda."), *with* Micah Ables, *Women*

the presidential nomination from a major party.[8] Women all over the world listened to allegations of sexual assault and harassment against powerful men, and said, "Me too."[9] For the first time in the country's history, a woman is serving as Vice President.[10]

In 2018, another Supreme Court nominee was accused of sexual misconduct, and again the Senate held a hearing. In the aftermath of that hearing, the progress made between 1991 and 2018 seemed minimal. While Dr. Ford was treated with more respect than Professor Hill, it was clear that many Senators didn't consider the allegations against Judge Kavanaugh serious enough to disqualify him from a seat on the Supreme Court. In the words of a *Washington Post* columnist: "Some [Senate Republicans] will bad-mouth [Kavanaugh's accusers], while others will sound concerned. But in all cases, they will keep Kavanaugh's nomination moving forward, whatever the truth of the matter. After all, it is a man's world."[11]

The shift in Senators' treatment of Professor Hill and Dr. Ford is one in tone, not in substance. Senators who found the hearings politically inconvenient couldn't blame Dr. Ford for the assault or attack her character—such outwardly sexist sentiments

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Aren't the Problem. Standards Are., MOD. WAR INST. AT W. POINT (Feb. 5, 2019), https://mwi.usma.edu/women-arent-problem-standards/ [https://perma.cc/CVW3-NYPQ] (responding to Mac Donald, *supra*, and arguing that physical standards are about how a soldier responds to physical demands, and further arguing that the military should not overturn the policy because it has not perfected integration in under five years).

8 Patrick Healy & Jonathan Martin, *Democrats Make Hillary Clinton a Historic Nominee*, N.Y. TIMES (July 26, 2016), https://www.nytimes.com/2016/07/27/us/politics/dnc-speakers-sanders-clinton.html [https://perma.cc/G4NU-B7T3].

9 *See generally* ME TOO., https://metoomvmt.org/get-to-know-us/history-inception/ [https://perma.cc/J5L8-RWH4] (introducing a movement aimed—among other things—at implementing systemic change in the area of sexual harassment and assault); Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976?lang=en (bringing the Me Too movement and sex harassment to the nation's attention).

10 Elissa Nadworny, *Kamala Harris Sworn in as Vice President*, NPR (Jan. 20, 2021, 11:43 AM), https://www.npr.org/sections/inauguration-day-live-updates/2021/01/20/958749751/vice-president-kamala-harris-takes-the-oath-of-office [https://perma.cc/4BFN-6YVH]; Chelsea Janes, *Kamala Harris, Daughter of Jamaican and Indian Immigrants, Elected Nation's First Female Vice President*, WASH. POST (Nov. 7, 2020, 11:43 AM), https://www.washingtonpost.com/politics/kamala-harris-vice-president/2020/11/07/5e6cb460-1df2-11eb-90dd-abd0f7086a91_story.html [https://perma.cc/HN8J-QCW3] ("A vice president-elect stepped forward on Saturday, and, for the first time in American history, she was not a man. . . . Harris's victory comes 55 years after the Voting Rights Act abolished laws that disenfranchised Black Americans, 36 years after the first woman ran on a presidential ticket and four years after Democrats were devastated by the defeat of Hillary Clinton, the only woman to win the presidential nomination of a major party.").

11 Helaine Olen, Opinion, *Why Senate Republicans Won't Ferret out the Truth About Brett Kavanaugh's Past*, WASH. POST (Sept. 27, 2018), https://www.washingtonpost.com/blogs/post-partisan/wp/2018/09/27/why-senate-republicans-wont-ferret-out-the-truth-about-brett-kavanaughs-past/ [https://perma.cc/3UV8-23EZ].

would be recognized and condemned. Instead, they focused on issues other than Dr. Ford's credibility—such as the timing of the allegations, concern over Kavanaugh's reputation and his family's reputation, concerns over the integrity of the hearing[12]—and even appeared to sympathize with her.[13] In diverting the focus of the hearing from

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12 *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 710–11 (2018) [hereinafter *Kavanaugh Confirmation Hearing*] (statement of Sen. Orrin Hatch) ("[T]he circus atmosphere that has been created since my Democratic colleagues first leaked Dr. Ford's allegations to the media 2 weeks ago, after sitting on them for 6 weeks, I might add, has brought us the worst in our politics. . . . This is worse than Clarence Thomas. I did not think it could get any worse than that. This is a national disgrace the way you are being treated. And in the middle of it all, we have Judge Kavanaugh, a man who until 2 weeks ago was a pillar of the legal community . . . ."); *id.* at 702–03 (statement of Sen. Lindsey Graham) ("To my Republican colleagues, if you vote no, you are legitimizing the most despicable thing I have seen in my time in politics. . . . I hope you are on the Supreme Court. That is exactly where you should be."); *id.* at 705 (statement of Sen. John Cornyn) ("I cannot think of a more embarrassing scandal for the United States Senate since the McCarthy hearings when the comment was about the cruelty of the process toward the people involved, and the question was asked, 'Have you no sense of decency?' And, I am afraid we have lost that, at least for the time being."); *id.* at 726–27 (statement of Sen. Ted Cruz) ("Let me say to you and your family, thank you for a lifetime of public service. I will say watching your mother's pained face has been heart-wrenching as she's seen her son's character dragged through the mud after not only your lifetime of public service, but her lifetime of public service as well. And I know as a father, there's been nothing more painful to you than talking to your daughters and explaining these attacks that the media is airing."); *id.* at 722–23 (statement of Sen. Thom Tillis) ("I apologize for what you're [Kavanaugh] going through right now. . . . We've [the committee] had an allegation held for nearly 7 weeks that would've given us plenty of time to investigate. . . . [Democrats] listened in on at least one [previous] interview with you and didn't ask a single question. . . . I think you've been treated unfairly, and I'm amazed that . . . none of these questions came up when [the allegations were] fully known.").

13 *See generally Kavanaugh Confirmation Hearing*, *supra* note 12, at 691–732 (committee members' questioning of Judge Kavanaugh). Senator Ben Sasse had perhaps the most thinly veiled concern for Dr. Ford. He mentioned only in passing that he believed her, quickly returning to his attack on the Democrats' timing in bringing the allegations to the attention of the committee:

> Did the Ranking Member [Feinstein] already have these allegations for [about 35 days when we first met with you?] A recommendation was made by the Ranking Member or her staff to Dr. Ford—and, by the way, I think Dr. Ford is a victim, and I think she has been through hell, and I am very sympathetic to her. . . . But then once the process was closed . . . then this was sprung on you? Just want to make sure I have the dates correct. Right? Because we have got 35-plus days from all the time that this evidence was in the hands, recommendations were made to an outside lawyer, you could have handled all this, we could have had this conversation in private in a way that did not . . . do crap to his family[.]

Dr. Ford's credibility to auxiliary issues, Senators were able to avoid backlash from appearing not to believe Dr. Ford while carving a path to confirm Judge Kavanaugh.[14]

Dr. Ford described the difficulty in deciding whether to report what happened to her:

> However, once he was selected, and it seemed like he was popular and was a sure vote, I was calculating daily the risk-benefit for me of coming forward and wondering whether I would just be jumping in front of a train that was headed to where it was headed anyway and that I would just be personally annihilated.[15]

Unfortunately, she was right. Brett Kavanaugh—despite the concern for his reputation—has become a lifetime member of the Supreme Court. Dr. Ford described having to move to "various secure locales," sometimes with her family and sometimes apart from her family, always with security guards.[16] She was constantly harassed, received death threats, her work email was hacked, and her personal information was posted online.[17] Dr. Ford's statement to the Senate Judiciary shows that to many Americans, sex harassment and sexual violence are nothing more than opportunities to further harass the victim. These are the kinds of responses Title VII is meant to eliminate in the workplace. Unfortunately the legal standards have become more tolerant than prohibitive.

Americans made significant progress between 1991 and 2018 in how we understand sex harassment and assault. Despite this progress, the Kavanaugh confirmation hearing illustrates that we still have a lot to learn. As a nation, we may be more aware of sex harassment, but we're no closer to stopping it. In 1991, the all-white, all-male Senate Judiciary Committee lashed out at Anita Hill and blamed her for Clarence Thomas's harassment.[18] She was accused of inventing the allegations because if the harassment was really that bad, "[w]hy in God's name" would she not just leave her job?[19] Dr. Ford, on the other hand, was generally believed by the

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Id. at 716. Senator Sasse's flippant "and, by the way, I think Dr. Ford is a victim," fulfills his obligation to appear concerned about sexual assault victims, without being deterred from his mission to confirm Kavanaugh.

14 For a detailed analysis of Dr. Ford's and Judge Kavanaugh's testimony informed by gender, class, and race norms, see generally Ann C. McGinley, *The Masculinity Mandate: #MeToo, Brett Kavanaugh, and Christine Blasey Ford*, 23 EMP. RTS. & EMP. POL'Y J. 59 (2019).

15 *Kavanaugh Confirmation Hearing*, *supra* note 12, at 642.

16 *Id.* at 638.

17 *Id*

18 *Thomas Nomination Hearings*, *supra* note 1, at 123 (testimony of Anita F. Hill, in response to a question by Sen. Dennis DeConcini) ("And the fact that you admit that in retrospect maybe you should have done something, do you conclude that it is all someone else's fault, and not your own?").

19 *Id.* at 128 (testimony of Anita F. Hill, in response to a question by Sen. Alan K. Simpson).

Senate.[20] Senators believed that Brett Kavanaugh sexually assaulted her, but they did not believe that his conduct was severe enough to disqualify him from taking a seat on the Supreme Court.[21] After all, he was a drunk teenager, and "[i]f somebody can be brought down by accusations like [sexual assault], then . . . every man certainly should be worried."[22]

The Senate's treatment of Anita Hill and Christine Blasey Ford is an appropriate analogy for developments in sex harassment law. It has progressed from blaming victims to believing them, but that is where the progress stops. A critical part of sex-based harassment litigation has become employer liability. Courts have slowly broadened the definition of sex harassment, but without a basis for holding employers liable, a case cannot succeed. Unless an employee is harassed by her supervisor, liability rests on the employer's knowledge, usually through the victim reporting harassment—something very few do. Courts' extreme deference to employers who simply *have* anti-harassment policies, regardless of how effective those policies are, has stifled most Title VII claims at summary judgment.[23]

The current legal framework creates an impossible standard for many plaintiffs. If a victim doesn't report harassment, her[24] employer usually won't be liable regardless of what it knew or should have known. Judges don't understand the emotional toll wrought by sex-based harassment, so they have developed a standard that makes sense

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20 *See* McGinley, *supra* note 14, at 65–68, 70–71 (discussing responses to Dr. Ford's testimony and analyzing how gender roles influenced those responses).

21 *Id.*

22 Burgess Everett, *Flake Opposes Quick Vote on Kavanaugh, Putting Confirmation in Doubt*, POLITICO (Sept. 16, 2018), https://www.politico.com/story/2018/09/16/kavanaugh-allegation-anonymous-republicans-825855 [https://perma.cc/7P4N-FE93] (quoting "a lawyer close to the White House").

23 *See generally* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance*, 26 HARV. WOMEN'S L.J. 3 (2003); Tristin K. Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, 128 YALE L.J.F. 152 (2018); Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. L. REV. ONLINE 62 (2018); Schultz, *supra* note 3.

24 I will usually use feminine pronouns to describe victims and masculine pronouns to describe harassers throughout this note, but I do not mean to argue that sex harassment is solely a women's issue. Most legal and social science research focuses on women as victims of harassment, and women do make up most of the EEOC's sex harassment charges. *See Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010–FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2020 [https://perma.cc/MCN4-3324] (reporting that between 2010 and 2020, sex harassment charges to the EEOC were only about 16–17% male). But I also realize that stigma affects men differently in a way that might discourage them from reporting harassment, perhaps even more so than women. Accordingly, my gender-specific pronouns are a way to avoid confusion based on the research available to me, rather than an assertion that victims of sex-based harassment are exclusively female and harassers are exclusively male.

to them[25]—if it's bad, report it; if the employer looks into the claim, it was handled properly. Unfortunately this view ignores the realities of many plaintiffs and places an unrealistic burden on their claims of discrimination. Plaintiffs are unlikely to succeed in proving their employer was negligent as long as their employers have anti-harassment policies, and almost all do.[26] To give effect to Title VII, courts need to find more creative methods of enforcing the statute. I propose imposing mediation in cases where courts find that a discriminatory employment practice occurred, but that the negligence standard was not met. The plaintiff may be able to receive compensation from another source, but the goal of this approach is that hostile work environments finally be addressed. Courts have refused to evaluate the effectiveness of the anti-harassment policies that insulate employers, while noting that harassment is a problem in the American workplace.[27] The obvious conclusion courts continue to avoid is that anti-harassment policies fail to prevent harassment and should not be given the deference they have enjoyed. Courts may have to protect employers from monetary liability by applying the negligence standard, but they should still implement remedies that protect employees. Mediation would serve this purpose if it is focused on restorative justice and aimed at changing policies to effectively handle harassment.

Just like the Senate, courts' concern for sex harassment is superficial. Despite numerous social science studies showing that very few women report sex

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25 Justice Ginsburg spent her legal career getting the federal courts to change their conceptions of the role of women and sex discrimination. *See* Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 301–05 (1979) (detailing her successes in the Supreme Court). Likely because of her legal career and the overt sex discrimination she faced as a law student and young lawyer, Justice Ginsburg took the rare step of delivering an oral dissent in a 2013 case that limited the scope of employer liability in Title VII cases, accusing the Court of disregarding the realities of the workplace and effectively eliminating remedies for many victims of workplace harassment. Oral Dissent of Justice Ginsburg at 4:18, Vance v. Ball State Univ., 570 U.S. 421 (2013) (No. 11-556), https://apps.oyez.org/player/#/roberts6/opinion_announcement_audio /24140 [https://perma.cc/2WSV-QEK2]. Ignoring the background and insight that shaped his colleague's opinion, Justice Alito—who wrote the majority opinion—"pursed his lips, rolled his eyes to the ceiling, and shook his head 'no.'" Garrett Epps, *Justice Alito's Inexcusable Rudeness*, ATLANTIC (June 24, 2013), https://www.theatlantic.com/national/archive/2013/06/justice-alitos-inexcusable-rudeness/277163/ [https://perma.cc/ZN73-FYKQ]. Apparently, this is a habit of his, especially during the remarks of his female colleagues. Dana Milbank, Opinion, *Justice Samuel Alito's Middle-School Antics*, WASH. POST (June 24, 2013), https://www.washingtonpost.com/opinions/dana-milbank-justice-samuel-alitos-middle-school-antics/2013/06/24/534888f8-dd0d-11e2-9218-bc2ac7cd44e2_story.html?tid=a_inl_manual [https://perma.cc/3D6S-5MVF].

26 Grossman, *supra* note 23, at 19.

27 *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 798 (1998) ("It is by now well recognized that hostile environment sexual harassment by supervisors (and, for that matter, coemployees) is a persistent problem in the workplace.")

harassment,[28] employers are rarely liable for harassment if the victim failed to file a complaint. The effectiveness of a complaint procedure is irrelevant—it just needs to exist. As long as employers treat harassed employees like Christine Blasey Ford rather than Anita Hill, they are safe from liability. It doesn't matter that the outcome is the same.

In the next Part, I review case law discussing sex harassment and its shift from substance to the formalities of liability. Part III discusses legal theories and scholarship that attempts to explain the weakening of Title VII. In Part IV, I review some social science concepts relevant to the progression of Title VII and the EEOC's recent report on the research. Part V introduces my approach to restorative mediation before concluding in Part VI.

II. STANDARDS OF EMPLOYER LIABILITY FOR SEX-BASED HARASSMENT UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Under Title VII, it is unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex[.]"[29] Sex-based harassment is a form of discrimination on the basis of sex[30] and violates Title VII when it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[31] Severity and pervasiveness are judged both subjectively and objectively by considering all of the circumstances in a particular case.[32] Occasional sexist jokes or the single use of a racial epithet will not meet the objective severity/pervasiveness standard. However, "'[t]he phrase "terms, conditions, or privileges of employment" [in Title VII] evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women" in employment,' which includes requiring people to work in a discriminatorily hostile or

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28 *See, e.g.*, CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP. OPPORTUNITY COMM'N, REPORT OF THE CO-CHARIS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 15–16 (2016), https://perma.cc/2K3M-MMRL [hereinafter EEOC TASK FORCE REPORT]; Alieza Durana et al., *Sexual Harassment: A Severe and Pervasive Problem*, https://d1y8sb8igg2f8e.cloudfront.net/documents/Sexual_Harassment_A_Severe_and_Pervasive_Problem_2018-10-10_190248.pdf [https://perma.cc/9ZNS-RBAT] (last updated Sept. 26, 2018); Lilia M. Cortina & Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, *in* THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 484–85 (Julian Barling & Cary L. Cooper eds., 2008).

29 42 U.S.C. § 2000e-2(a)(1).

30 *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." (alteration in original)).

31 *Id.* at 67 (alteration in original) (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir 1982)).

32 Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 23 (1993).

abusive environment."[33] The focus on severity and pervasiveness moves the legal inquiry away from the harm suffered by the plaintiff. Accordingly, Title VII's protections take effect before a victim suffers psychological injury:

> A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.[34]

There are two types of sex-based harassment—harassment that results in a "tangible employment action" and harassment that does not.[35] The following discussion reviews the path of employment discrimination case law leading to this distinction and how key decisions have significantly weakened Title VII by foreclosing its remedies to plaintiffs in most harassment claims.

A. Agency Law and the Roots of Employer Liability

When the Supreme Court recognized sex-based harassment as a form of discrimination in *Meritor Savings Bank v. Vinson*, it declined to decide a standard for employer liability. The Court rejected a standard of strict liability for hostile work environments created by a plaintiff's supervisor and directed lower courts to consult the *Restatement (Second) of Agency* when evaluating liability.[36] Circuit courts developed different interpretations of agency principles and the extent to which they controlled liability under Title VII.

For the next three decades, agency law shaped the employer liability framework.[37] Section 219(2)(d) of the *Restatement (Second) of Agency* became particularly influential in analyzing liability in cases where a plaintiff alleged she was harassed by a supervisor.[38] Under section 219(2)(d), an employer may be liable for an employee's harassment if the harasser was "aided in accomplishing the [harassment] by the

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33 *Id.* at 21 (quoting *Meritor*, 477 U.S. at 64).

34 *Id.* at 22.

35 *See infra* Section II.A.1.

36 *Meritor*, 477 U.S. at 72.

37 *See, e.g.*, Burlington Indus. v. Ellerth, 524 U.S. 742, 758–63 (1998) (applying the Restatement (Second) of Agency to Title VII cases); *Meritor*, 477 U.S. at 72 (directing courts to consult the Restatement (Second) of Agency for guidance in analyzing employer liability). *But see Vance*, 570 U.S. at 442 (rejecting EEOC guidelines that relied on the Restatement (Second) of Agency for a bright-line rule of employer liability).

38 *E.g.*, *Ellerth*, 524 U.S. at 758 (discussing the "much-cited § 219(2)").

existence of the agency relation."[39] Supervisory harassers rely on their authority over their victims—which exists because of the supervisor's agency relationship with the employer—when harassing a subordinate employee.[40] However, relying solely on agency principles would make employers strictly liable for supervisors' harassment, something explicitly rejected by *Meritor*.[41]

Relying on guidance from the EEOC, *Meritor* recognized two different types of sex-based harassment—quid pro quo and hostile work environment. Quid pro quo harassment reflected an explicit change in the terms and conditions of a plaintiff's employment and was linked to some economic injury or employment decision.[42] Hostile work environment harassment, on the other hand, did not require an economic injury.[43] They fell within the scope of Title VII because the statute "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[44] Distinguishing the two types of harassment—rather than acknowledging one form of harassment, which did not have to cause economic injury—laid the foundation for challenging employer liability on hostile work environment claims.

The Court was divided 5-4 on the issue of liability, and Justice Marshall's concurring opinion highlighted the problems with regarding one form of harassment as a less serious injury.[45] He argued that agency principles imposed strict liability on an employer when a supervisor harassed a subordinate, regardless of the type of harassment the victim suffered.[46] Since agency principles attach to the actor, not the action, it was illogical to leave open the possibility for two standards of liability when a supervisor harassed a subordinate:

> Thus, for example, when a supervisor discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer. The courts do not stop to consider whether the employer otherwise had "notice" of the action, or even whether the supervisor had actual authority to act as he did.

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39 *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (AM. LAW INST. 1958)).

40 *Id.*

41 *Id.* at 760; *Meritor*, 477 U.S. at 70.

42 *See Meritor*, 477 U.S. at 64–65. *See generally Ellerth*, 524 U.S. at 752–53 (describing the lower courts application of the quid pro quo/hostile work environment framework after *Meritor*).

43 *Meritor*, 477 U.S. at 65–67.

44 *Id.* at 65.

45 *See id.* at 74 (Marshall, J., concurring). Justices Marshall, Brennan, Blackmun, and Stevens all felt that the issue of liability could be properly addressed. *Id.* Justice Marshall essentially argued for exactly what the majority prohibited—strict liability whenever a victim's harasser is her supervisor. *Id.* at 74–74; *cf. id.* at 72 (majority opinion).

46 *Id.* at 75–76 (Marshall, J., concurring).

The notice requirement would eventually become the standard for almost all harassment cases, even if the harasser was the victim's supervisor.[47]

1. Supervisor Harassment and the Ellerth-Faragher Affirmative Defense

Confronted by confusion among the lower courts about when plaintiffs could claim quid pro quo harassment—usually accompanied by strict liability for the employer—the Court finally addressed the question of liability in *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*.[48] In the wake of *Meritor*, lower courts had applied strict liability to supervisor harassment in quid pro quo cases.[49] When a supervisor created a hostile work environment, lower courts struggled to find an appropriate standard, balancing the power dynamic between supervisor and subordinate with the absence of an economic injury.[50] The Supreme Court discussed agency principles at length in *Faragher*, specifically when an agent's conduct was within the scope of his employment.[51] It cited the *Restatement (Second) of Agency* in stating that the ultimate question about whether an action was in the scope of authority—implicating strict liability—was whether the injury could be considered part of the normal course of business.[52] Recognizing the prevalence of sex-based harassment in the workplace, the Court considered and rejected argument that "the burden of the untoward behavior [should be assigned] to the employer as one of the costs of doing business, . . . rather than the victim."[53] Sexual advances, regardless of how severe and pervasive or whether they came from a supervisor or a coworker, were, in the Court's words "frolics or detours from the course of employment," and therefore could not be within its scope.[54] Another factor in the Court's analysis was that the same conduct, if performed by a coworker, would only lead to employer liability if the plaintiff could

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47 *See infra* Section II.A.2.

48 *Ellerth*, 524 U.S. at 752–53; Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998). *Ellerth* and *Faragher* focused on slightly different aspects of employer liability. *Faragher* presented issues about hostile work environment harassment, while the issue in *Ellerth* was whether quid pro quo harassment applied when an adverse action was only threatened, but not carried out. Brief for Petitioner at i, *Faragher*, 524 U.S. 775 (No. 97-282); Brief for Petitioner at i, *Ellerth*, 524 U.S. 742 (No. 97-569). Since the Court ultimately rejected the quid pro quo/hostile work environment classification for harassment claims, the cases adopted the same holding.

49 *Ellerth*, 524 U.S. at 752–53.

50 *Id.* at 763–64. The confusion among the circuit courts is demonstrated quite well by the Seventh Circuit's en banc opinion in *Ellerth*, "a decision which produced eight separate opinions and no consensus for a controlling rationale." *Id.* at 750.

51 *Faragher*, 524 U.S. at 793–801.

52 *Id.* at 797.

53 *Id.* at 798.

54 *Id.* at 798–99.

prove the employer was negligent.[55] The Court did recognize that a supervisor's power over his victim could make it more difficult for her to refuse, ignore, or report him; however, it refused to deviate from the *Meritor* Court's position that strict liability should not be imposed in all cases of supervisor harassment.[56]

Ellerth, after rejecting the term "quid pro quo," focused on when plaintiffs could invoke the higher standard of liability for tangible employment actions.[57] *Ellerth* also involved the conduct of a supervisor whose harassment "could be construed as threats to deny [the plaintiff] tangible job benefits."[58] However, his threats were never carried out and the Court determined that his conduct only amounted to a hostile work environment.[59] A supervisor must take a tangible employment action to hold the employer strictly liable, and since Ellerth's supervisor never acted on his threats, he did not take a tangible employment action.[60] Tangible employment actions constitute "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[61]

The Court determined that the regular negligence standard for hostile work environment claims was inappropriate for a supervisor's harassment that doesn't result in a tangible employment action and responded by creating an affirmative defense.[62] An employer will not be liable for a hostile work environment created by a supervisor if it took reasonable care to prevent and correct any harassing behavior and if the victim unreasonably failed to take advantage of the employer's corrective and

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55 *Id.* at 798–801.

56 *Id.* at 802–04.

57 Burlington Indus. v. Ellerth, 524 U.S. 742, 752–54 (1998).

58 *Id.* at 747–48.

59 *Id.* at 754.

60 *Id.*

61 *Id.* at 761. Tangible employment actions are not always clear and can vary from circuit to circuit. Some courts have held that a bonus is a tangible employment action. *See, e.g.*, Davenport v. Edward D. Jones & Co., 891 F.3d 162, 170 (5th Cir. 2018); Russell v. Principi, 257 F.3d 815, 819 (D.C. Cir. 2001). Reducing an employee's hours may be a tangible employment action. *See* Nzabandora v. Rectors & Visitors of the Univ. of Va., 749 F. App'x 173, 175 (4th Cir. 2018). The Tenth Circuit attempted to clarify the issue in *Kramer v. Wasatch County Sheriff's Office*, 743 F.3d 726, 739 (10th Cir. 2014) with a simple test: "One common sense test that can illuminate whether a given harm is a tangible employment action is to ask whether a co-worker could have inflicted the same harm as easily. If the answer is yes, then the harm is not a tangible employment action." This inquiry doesn't address whether an injury is significant enough to be considered a tangible employment action, but it may be a good starting point.

62 *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08.

preventative measures.[63] If an employer has an anti-harassment policy that the victim knows about, but unreasonably fails to use, an employer will not be liable.[64]

2. The Negligence Standard

If an employer meets both elements of the *Ellerth-Faragher* defense—that it acted reasonably with regard to corrective action and the victim did not—then the employer's liability will be judged under a negligence standard, meaning the plaintiff must prove the employer knew or should have known about the harassment and failed to take appropriate action.[65] This standard is also applied to cases where the victim's harasser is a coworker or a third party, like a patient or customer.[66] The holding of *Ellerth* and *Faragher* expressly found that promulgation of an anti-harassment policy with complaint procedures was relevant to the first element of the defense and an employee's failure to use a known complaint procedure was relevant to the second.[67] The negligence standard in harassment cases has become so closely related to anti-harassment policies that having an anti-harassment policy has essentially become the standard of liability.[68]

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63 *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08. For a discussion of the reasonableness requirement when it comes to reporting sexual harassment, see L. Camille Hébert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711, 717 (2007) (noting that courts often read "and" as "or" when applying the *Ellerth-Faragher* framework, allowing employers to escape liability if both parties acted reasonably).

64 Federal courts have a skewed view of what is reasonable. Seventy-five percent of victims who reported harassment faced some form of retaliation. EEOC TASK FORCE REPORT, *supra* note 28, at 16. Nevertheless, courts generally find that fear of retaliation is unreasonable unless the victim can articulate specific grounds for her fear. *See, e.g.*, Minarsky v. Susquehanna City, 895 F.3d 303, 315 (3d Cir. 2018) (finding that the victim's fear was specific, and not "unsubstantiated"); Burns v. Johnson, 829 F.3d 1, 19 (1st Cir. 2016) (same). Notably, as of June 1, 2017, the federal judiciary was only 34% female (women represented 34% of district court judges, 37% of circuit court judges, and 33% of Supreme Court Justices). BARRY J. MCMILLION, CONG. RSCH. SERV., R43426, U.S. CIRCUIT AND DISTRICT COURT JUDGES: A PROFILE OF SELECT CHARACTERISTICS 4–5, 15–16 (2017).

65 *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08.

66 29 C.F.R. § 1604.11(e) (2021).

67 *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08.

68 *See generally* Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U. L. REV. 1029, 1042 (2015) ("The [*Ellerth-Faragher*] defense, which carves out an exception to a general rule of automatic liability, represents a key shift in Title VII law from an emphasis on substance to an emphasis on procedure. The question is not whether employers have successfully prevented or responded to problems of harassment, but whether they have erected an internal system designed to do those things—whether successful or well-engineered or neither."); *see also id.* at 1045 (describing the short reporting time paired with weakened protection from retaliation as a deterrent to even filing a complaint).

The Supreme Court again made liability harder to prove in 2013 when it decided *Vance v. Ball State University*, which limited who could be considered a supervisor.[69] All other employees were deemed "coworkers," invoking the negligence standard.[70] The Court noted that its decision was beneficial to all parties because it created a bright line in determining who qualifies as a supervisor and there would no longer be the need for lengthy, fact-sensitive inquiries or confusing jury instructions.[71] Since discrimination claims are inherently fact-sensitive inquiries and the point of Title VII was "to strike at the entire spectrum"[72] of workplace discrimination, choosing to limit plaintiffs' claims for the sake of expediency illustrates the Court's hostility toward harassment claims.

B. Title VII Jurisprudence as a Superficial Concern

The Supreme Court's decisions reveal that the Court, much like the Senate at the Kavanaugh hearing,[73] is concerned only with appearing to take sex harassment seriously. There is a noticeable shift in the Court's language once it begins considering employer liability instead of the substantive elements of harassment. When considering whether actionable harassment needed to prove a tangible injury, the Court responded forcefully in the negative:

> A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will

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69 Vance v. Ball State Univ., 570 U.S. 421, 424 (2013). According to the dissent, this strict definition of a supervisor "misses the forest for the trees" and ignores the reality of modern workplace hierarchy, which has many levels of supervisor other than those who can take tangible employment actions. *Id.* at 457 (Ginsburg, J., dissenting). The dissent argued that the Court should have adopted the EEOC's guidelines, which defined a supervisor either as someone who had the ability to take tangible employment action, or someone who oversaw employees' daily activities. *Id.* at 451.

70 Sometimes a "coworker" doesn't have the authority to take tangible employment action against the victim, but the employer essentially rubber stamps any decision he makes. This is known as the "cat's paw" theory of liability, and employers usually cannot escape liability in these cases. *See generally* Crystal Jackson-Kaloz, Note, *Cat Scratch Fever: The Spread of the Cat's Paw Doctrine in the Second Circuit*, 67 CATH. U. L. REV. 410 (2018) (discussing the cat's paw doctrine and its application to employer liability under Title VII). Delegating supervisory work to an employee might make them a "supervisor" under the *Vance* standard even if the power to hire, fire, promote, or demote lies elsewhere. *Vance*, 570 U.S. at 447.

71 *Vance*, 570 U.S. at 431–33, 441–45. The Court specifically mentioned that "[c]ourts and commentators alike have opined on the need for reasonably clear jury instructions in employment discrimination cases." *Id.* at 444. This concern is arguably less important that the need for a legal framework that's relevant in an actual work environment, instead of one based on what judges think happens in a work environment. The need for clear jury instructions seems disingenuous considering the rate at which employment discrimination cases get dismissed—a rate which the *Vance* decision will likely increase.

72 Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).

73 *See supra* Part I.

> detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends *Title VII's broad rule of workplace equality*.[74]

Once employer liability was at issue, however, the Court didn't find Title VII to be quite so protective:

> Although *Meritor* suggested the limitation on employer liability stemmed from agency principles, the Court acknowledged other considerations might be relevant as well. For example, Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context. To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose. As we have observed, Title VII borrows from tort law the avoidable consequences doctrine, and the considerations which animate that doctrine would also support the limitation of employer liability in certain circumstances.[75]

Faced with the consequences of permitting a broad range of conduct to fall within the purview of Title VII, the Court determined that the victims of harassment should bear some responsibility in maintaining a harassment-free workplace. Title VII's purpose has gone from "strik[ing] at the entire spectrum" of workplace discrimination[76] to chipping away at it modestly, but only in certain circumstances.

III. ARRIVING AT NEGLIGENCE

While *Vance* was a blow to Title VII protections because it limited the definition of "supervisor," its practical effect is likely minimal. Courts have largely interpreted the *Ellerth-Faragher* defense to mean that if an employee does not report harassment and the employer has an anti-harassment policy that the employee knew about, the employer has proven the defense.[77] This Part discusses the history of how judges have treated Title VII claims, introduces legal theories about sex harassment, and discusses the shift toward employer anti-harassment policy deference.

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74 Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (emphasis added).

75 *Ellerth*, 524 U.S. at 764 (citations omitted).

76 *Meritor*, 477 U.S. at 64.

77 *See, e.g.*, Schultz, *supra* note 3, at 42.

A. Title VII and Summary Judgment

Title VII's purpose was to "strike at the entire spectrum" of workplace discrimination.[78] Instead of holding employers responsible for a broad range of illegal conduct, however, Title VII jurisprudence has largely carved out exceptions to employer liability. While the first few years of employment discrimination law were promising, judges eventually began treating Title VII claims with increasing skepticism and hostility.

In the first decade after Title VII was passed, federal courts "created a Title VII jurisprudence that expressed our nation's highest ideals of openness and equality," at least in race discrimination claims.[79] In disparate impact claims, for example, judges were unlikely to accept an employer's argument that the racial segregation of its workforce was a result of the protected class's lack of interest in certain jobs.[80] In sex discrimination claims, however, judges more readily accepted the lack of interest defense to explain gender segregation and by the late 1970s, were more willing to accept the defense in race discrimination cases.[81] When courts framed segregated workplaces as individual preference beyond an employer's control, they "privatized job segregation and placed it beyond the reach of the law."[82]

In the mid-1990s, several employment law scholars noted with concern the increased use of summary judgment in employment discrimination cases.[83] While

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78 *Meritor*, 477 U.S. at 64.

79 Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1181 (1992).

80 *Id.* at 1076 & n.9, 1181.

81 *Id.* at 1181.

82 *Id.* Schultz and Petterson powerfully conclude:

> Throughout history, the dominant culture has rationalized women's employment in low-paying, dead-end jobs as the expression of their own preordained preferences for suitably "feminine" work. Similarly, our society has rationalized minorities' inferior economic status as the reflection of their own lack of initiative. Whereas Title VII jurisprudence once rejected and stood in tension with such cultural attitudes, it now incorporates them to a large extent. . . . Unless the courts change course, Title VII may someday be perceived as a short-lived, but failed, experiment in equality.

Id. Their description of federal courts rationalizing discrimination by incorporating cultural attitudes into Title VII jurisprudence certainly rings true for sex-based harassment. I fear the hands-off approach adopted by the courts has led us dangerously close to "short-lived, but failed, experiment in equality" territory.

83 Deborah Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2237 (1995); Ann McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 243 (1993);

summary judgment became more common in all cases in response to the Supreme Court's 1986 decisions on civil procedure,[84] federal courts initially recognized that employment discrimination claims, which involve the delicate balancing of facts, present triable issues of fact and should rarely be decided at the summary judgment stage.[85] However, granting summary judgment became a tool of clearing dockets, and judges began to use summary judgment even in employment discrimination cases.[86] And these cases were being decided overwhelmingly in favor of employers.[87] A 2001 study comparing discrimination cases with insurance and personal injury cases found that *ninety-eight percent* of employment discrimination cases were decided for employers during the pre-trial stage, compared to sixty-six percent of defendants' dispositive motions being granted for other types of cases.[88] A recent study of employment law cases filed in the Northern District of Georgia between 2010 and 2017 found that plaintiffs in sex harassment claims lost on the defendant's motion for summary judgment twice as often as other types of employment cases.[89]

Employment discrimination cases in general have had limited success surviving summary judgment,[90] and cases with female plaintiffs fare just as poorly in non-

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Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 753 (1995).

84 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986) ("[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (finding that the defendant does not have to support its summary judgment motion with evidence negating the plaintiff's claim); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 476 U.S. 574, 587 (1986) (establishing heightened summary judgment standards for the *nonmovant* in complex factual situations).

85 *See* Mark W. Bennett, *From the "No Spittin', No Cussin', and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 687–88 (2012–2013). Judge Bennett states that between the 1970s and 1990s, "[m]any circuits had a clearly stated preference against summary judgment in employment discrimination cases, especially disparate treatment cases, because they almost always turn on delicate factual nuances of intent." *Id.* at 688.

86 *Id.* at 688–89; *see also* Gallagher v. Delaney, 139 F.3d 338, 343 (2d Cir. 1998) ("The dangers of robust use of summary judgement to clear trial dockets are particularly acute in current sex discrimination cases.").

87 Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 560 (2001).

88 *Id.*

89 Charlotte S. Alexander, *#MeToo and the Litigation Funnel*, 23 EMP. RTS. & EMP. POL'Y J. 17, 46–47 (2019).

90 Helen Hershkoff & Elizabeth M. Schneider, *Sex, Trump, and Constitutional Change*, 34 CONST. COMMENT. 43, 102 (2019) (explaining that a 2007 report of the Federal Judicial Center revealed that 77% of discrimination cases were dismissed in whole or in part at the summary judgment stage, compared with 70% of other civil rights cases, 61% of torts cases, and 59% of

discrimination claims.[91] Whether to grant summary judgment involves some amount of discretion, and a review of the federal courts' Gender Bias task force reports from the late 1990s revealed that most sex discrimination claims were dismissed at some point before being allowed to proceed to the jury.[92] More recently, a study of 500 Equal Pay Act cases determined that dismissing wage discrimination claims at the summary judgment stage "is the modus operandi for most federal courts."[93] Jurors may be more sensitive to workplace realities than judges, but the current legal framework prevents many cases from reaching them.[94]

A small but vocal cohort of judges have remained committed to more fact-sensitive inquiries in employment discrimination cases,[95] particularly in sex discrimination cases where the standards of acceptable workplace conduct change rapidly.[96] Unfortunately, this opinion usually voiced in dissenting opinions when it is voiced at all.[97] The increasingly difficult standard for discrimination claims is likely the result of many factors; one voiced by many commentators suggests that after the first ten to

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contract cases); B. Glenn George, *Theory and Practice: Employer Liability for Sexual Harassment*, 13 WM. & MARY J. WOMEN & L. 727, 728 (2007) ("Using the [*Ellerth-Faragher*] affirmative defense on liability has proven an effective shield to bypass consideration of the harassment itself and avoid trial altogether. Even with modest evidence of past prevention efforts, employers are often granted summary judgment on the liability issue, thereby mooting any debate on what constitutes sexual harassment within the meaning of the statute.").

91 Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 711 (2007) ("There are many subtle ways in which judicial decision making with respect to summary judgment can be problematic: in judicial evaluations of female plaintiff credibility . . . ; in judicial assessment of the facts of the case or the strength of novel claims or rejection of novel arguments 'as a matter of law'; in judicial determination of whether a 'reasonable juror' could find for the plaintiff; and in judicial diminution and trivialization of the seriousness of harms suffered by women plaintiffs seeking redress in court.").

92 *Id.* at 710.

93 Hershkoff & Schneider, *supra* note 90, at 102. Interestingly, female judges dismissed pay discrimination claims less frequently than male judges. *Id.* at 102–03.

94 It's also important to remember that only 34% of federal district court judges are female. MCMILLION, *supra* note 64, at 15. While being female doesn't necessarily correspond with increased sensitivity to sex harassment claims, there is at least some evidence that female judges may be more sensitive to gender inequality than their male counterparts. *See* Hershkoff & Schneider, *supra* note 90, at 102–03.

95 *See* Bennett, *supra* note 85, at 690–93 (Judge Bennett discussing his own resistance to summary judgment and that of some of his colleagues across the country).

96 Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. CAL. L. REV. 791, 793 (2002); Gallagher v. Delaney, 139 F.3d 338, 343 (2d Cir. 1998) (reversing the trial court's grant of summary judgment to the defendant-employer in a sex harassment case).

97 *See* Bennett, *supra* note 85, at 691–93.

twenty years of Title VII litigation, judges started to assume that the law had effectively cured the structural ills Title VII targeted it targeted.[98] When discrimination does occur, judges see it not as an institutional problem, but rather a problem created by one bad actor.[99] Title VII has advanced workplaces enough that employers know to fire or discipline those they see as bad actors, and judges equate discipline with reasonable corrective action by employers, failing to require any structural changes within the organization. This approach fails to address the root of the problem because it does not address the culture within a workplace that allows harassment to occur.

B. The Path to a Weakened Title VII

Scholars have raised numerous concerns about the direction of employment discrimination litigation in federal courts as more cases are dismissed without the fact-sensitive inquiry they require.[100] Even as early as 1975, the Supreme Court began discussing racial discrimination as a thing of the past.[101] Much of the scholarly analysis has focused on inadequacies in the legal framework and a disconnect between the legal framework and reality.[102]

One of the biggest problems with sex harassment litigation is that courts only see sex harassment as an individual problem, thereby reducing a complex, systemic problem to little more than workplace bullying.[103] Sex-based harassment is not solely

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98 Michael J. Zimmer, *Systemic Empathy*, 34 COLUM. HUM. RTS. L. REV. 575, 585 (2003); TRISTIN K. GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW 3 (2017); Schultz & Petterson, *supra* note 79, at 1179.

99 Zimmer, *supra* note 98, at 593; Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1411–12 (1990). *See generally* GREEN, *supra* note 98.

100 *See supra* Section III.A.

101 Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975) ("The power to award backpay was bestowed by Congress, as part of a complex legislative design directed at a *historic evil of national proportions*." (emphasis added)); *id.* at 417–18 ("It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, *the last vestiges of an unfortunate and ignominious page in this country's history*.'") (quoting United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973) (emphasis added)).

102 *See, e.g.*, Mark R. Bandsuch, *Ten Troubles with Title VII and Trait Discrimination Plus One Simple Solution (A Totality of the Circumstances Framework)*, 37 CAP. U. L. REV. 965 (2009).

103 *See* Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 48 (1990) (explaining that when courts view sex harassment as a systemic problem rather than an individual one, they are more willing to find a cause of action); GREEN, *supra* note 98, at 3 (blaming the "personaliz[ation] of discrimination" for the decrease in employer liability); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 139–40 (1989) (explaining that discrimination framework is designed to address

individual harm, and it is rarely caused by a single person. Employers are responsible for the culture of a workplace and set the example of either tolerating or actively prohibiting harassment.[104] Instead of holding employers responsible for discriminatory cultures that foster harassment, courts simply refuse to impose any liability. Many commentators have remarked that after the first decade of Title VII litigation, judges believed that discrimination had been successfully purged from the American workplace and any remaining harassment was the result of individual bad actors, not systemic discrimination.[105]

Professor Alan Freeman calls this focus on the individual the "perpetrator perspective" and found that it is the dominant view in American legal culture.[106] The perpetrator perspective assesses Title VII cases through "timeless and abstract norms, unsullied by history or social reality."[107] The contrary view, called the "victim perspective," focuses on the purpose of antidiscrimination law—outlawing discrimination.[108] If the same conditions that existed before an antidiscrimination law was passed still exist after discrimination was prohibited, the law is ineffective.[109]

Legal standards create structures that force jurors to focus intensely on secondary issues, such as performance evaluations, which draws their attention away from the overall tone of a workplace.[110] Emphasizing a more holistic approach would allow jurors to determine whether some of the objective standards are merely examples of a hostile work environment; for example, whether the masculine overtones of a workplace cause dissatisfaction among female workers and contribute to poor performance.[111]

> It is a lot easier to focus on comparing what was stated in [the plaintiff's] and others' performance evaluations than it is to decide whether a gendered

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individual acts of discrimination within a system, but accepts the system as is instead of adopting a new system or set of rights in a workplace).

104 *See* GREEN, *supra* note 98, at 3 ("[E]ven when organizations do not formally sanction discrimination, they can incite discrimination through the structures, practices, and cultures that they create and maintain.").

105 *See, e.g.*, Schultz & Petterson, *supra* note 79, at 1181; Zimmer, *supra* note 98, at 584–85 ("The decision in *Brown v. Board of Education*, the civil rights movement, and the Civil Rights Act of 1964 came amidst critical and exciting times. But that period is long over. Now that it is, one reaction is to let the problems of discrimination regress, leaving society unsympathetic toward all workers, including women, African Americans, and members of other minority groups." (footnotes omitted)).

106 Freeman, *supra* note 99, at 1411–12.

107 *Id.* at 1412.

108 *Id.* at 1411.

109 *Id.*

110 GREEN, *supra* note 98, at 17.

111 *Id.*

> culture may have affected [the plaintiff's] interactions with her colleagues, her colleagues' interactions with other male employees, even her own un-team-like behavior, all of which may have influenced the content of the evaluations in the first place. But if the male-dominated dynamics [in a work environment] played a role in how [the plaintiff] and other women were evaluated . . . should we expect [their employer] to change those dynamics?[112]

Of course, as discussed in Section III.A, most employment discrimination cases don't make it to the jury. While some courts fail to see employer knowledge in many hostile work environment suits, others dismiss cases for failing to allege sufficiently severe and pervasive conduct.[113] Many states have adopted statutes similar to Title VII that prohibit a broader range of conduct and don't have as rigorous standards for satisfying the severe and pervasive element.[114] However, even stronger, less employer-friendly state laws fail to encourage more than superficial compliance.[115]

Although "severe and pervasive" is a subjective standard determined that offers plaintiffs little guidance, the bigger problem is the overwhelming dismissal of most Title VII cases.[116] Courts dismiss cases because they believe discrimination is adequately prevented by Title VII, a belief grounded in the over-emphasized individual nature of discrimination.[117] This approach "keep[s] us from asking bigger questions, and ultimately from seeking bolder and more effective solutions."[118] Sex harassment law is stuck in a phase of superficial compliance with a legal framework designed to favor employers to the detriment of victims and even harassers.

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112 *Id.* at 17–18.

113 *See* SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 30–31 (2017).

114 *See* Kate Webber Nuñez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PENN ST. L. REV. 463, 492–96 (2018) (using Gretchen Carlson's lawsuit against Fox News for the continued harassment she suffered by her male colleagues as an example of conduct that might fail under Title VII but may have been successful under the complementary New York City Human Rights Law).

115 *Id.* at 466.

116 *See supra* Section III.A.

117 *See* Jason R. Bent, *Hope for Zimmerism: Overcoming the Empathy Problem in Antidiscrimination Law*, 20 EMP. RTS. & EMP. POL'Y J. 277, 282 (2016) ("Notions about the general prevalence of discrimination, based not on any empirical evidence but instead on judges' own gut feelings or perceptions, might not just be affecting the outcome of individual cases, they might be affecting the development of the law.").

118 Green, *supra* note 23, at 154.

IV. ANTI-HARASSMENT POLICIES AS THE CONTROLLING STANDARD

As mentioned above, anti-harassment policies and training do not prevent harassment.[119] When the EEOC Commissioner, after studying 30 years of social science data, reached this conclusion in 2016, she described the result as "jaw-dropping."[120] Federal courts might have been just as surprised as the EEOC at this conclusion, but it hardly excuses their failure to undertake any reasonableness analysis of anti-harassment policies. This laissez-faire approach to employment discrimination is rendering Title VII useless and rewarding policies designed merely to avoid litigation.[121] "Despite the fact that 98 percent of companies say they have sexual harassment policies and many provide sexual harassment training . . . the problem of sexual harassment persists."[122] Workplaces with persistent harassment have negative effects not just for the victim, but for other employees, and for the workforce at large.[123] Employees are unhappy and unproductive—regardless of whether they feel they are personally being harassed.[124] Victims often develop depression, anxiety, and physical illness, such as high blood pressure, gastrointestinal problems, and chronic headaches.[125] Social science provides helpful guidance for setting minimum standards for employers to adopt in assessing the prevalence of workplace harassment.

Virtually all employers have adopted anti-harassment policies to insulate themselves from negligence claims in response to *Ellerth* and *Faragher*.[126] While

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119 *See generally* Susan Bisom-Rapp*, What We Know About Equal Employment Opportunity Law After Fifty Years of Trying*, 22 EMP. RTS. & EMP. POL'Y J. 337 (2018); Emily Leskinen et al., *Gender Harassment: Broadening Our Understanding of Sex-Based Harassment at Work*, 35 L. & HUM. BEHAV. 25 (2010); Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKLEY J. EMP. & LAB. L. 1 (2001); Bisom-Rapp, *supra* note 23; Justine E. Tinkler, *Resisting the Enforcement of Sexual Harassment Law*, 37 L. & SOC. INQUIRY 1 (2012).

120 Bisom-Rapp, *supra* note 23, at 63.

121 *See, e.g.*, Lauren B. Edelman, *What's the Point of Sexual Harassment Training? Often, to Protect Employers.*, WASH. POST (Nov. 17, 2017), https://www.washingtonpost.com/outlook/whats-the-point-of-sexual-harassment-training-often-to-protect-employers/2017/11/17/18cd631e-c97c-11e7-aa96-54417592cf72_story.html [https://perma.cc/SD9D-SENT].

122 Durana et al., *supra* note 28, at 17.

123 EEOC TASK FORCE REPORT, *supra* note 28, at 18.

124 *Id.* at 21–22.

125 Bernadette Baum, *Workplace Sexual Harassment in the "Me Too" Era: The Unforeseen Consequences of Confidential Settlement Agreements*, 31 J. BUS. & BEHAV. SCIS. 4, 11 (2019).

126 *See* Grossman, *supra* note 23, at 19; Faragher v. City of Boca Raton, 524 U.S. 775, 807–08 (1998) (explaining that the existence of an anti-harassment policy is relevant to the first element of the affirmative defense, and that an employee's failure to utilize the procedure will usually satisfy the second element).

supervisor harassment may implicate strict liability regardless of an employer's anti-harassment policy, use of a complaint procedure is virtually the only way to satisfy the liability requirement in cases of coworker harassment.[127] The existence of anti-harassment policies has become critical to employers because Courts typically consider the existence and distribution of a policy to be the end of the analysis and forego any discussion about whether the employer's policy and complaint procedure was reasonable or whether the plaintiff's failure to file a complaint was reasonable.[128] Professor Tristin Green refers to the practice of legalizing illegal discrimination, including harassment, as "discrimination laundering."[129]

Anti-harassment policies, complaint procedures, and harassment training all fail to prevent harassment.[130] Unfortunately, *Meritor*, *Ellerth*, and *Faragher* have created and reinforced a culture of superficial compliance with employment discrimination law.[131] The Court did not expressly require employers to adopt anti-harassment policies, but policies were the only factor it mentioned as being relevant to the affirmative defense.[132] Although some courts developed standards for analyzing complaint procedures in the early 1980s and 1990s,[133] most have abandoned that

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127 *See, e.g.*, Wierngo v. Akal Sec., Inc., 580 F. App'x 364, 367, 371–72 (6th Cir. 2014) (finding that employer could not be liable for sex-based harassment when the victim failed to complain specifically about the instances of harassment); Schaefer v. Peralta, No. 16-17784, 2019 WL 5191000, at *6 (E.D. La. Oct. 15, 2019) (rejecting employer liability when a county employee failed to report harassment, even though her harasser was the chief county executive); *cf.* Minarsky v. Susqueanna Cnty., 895 F.3d 303, 312–13 (3d Cir. 2018) (finding a question of fact as to employer's knowledge of harasser's conduct when harasser also harassed women who had the power to discipline him, but didn't).

128 Under the *Ellerth-Faragher* framework, an employer should still be liable if both employer and victim acted unreasonably, but courts treat the victim's unreasonableness as a win for the employer. Hébert, *supra* note 63, at 716–17. Although the presumption of liability does not attach to co-worker harassment, there is no reason courts should not make *some* inquiry into the reasonableness of the parties. In light of continually high rates of sex harassment despite employers almost universally having anti-harassment policies, it would almost make more sense to presume that a policy *isn't* reasonable.

129 *See generally* GREEN, *supra* note 98, at 1.

130 *See* sources cited *supra* note 119.

131 Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 280–81 (2001) ("[W]hile the burden of proof for [the *Ellerth-Faragher*] defense is obviously on the employer, it appears that there may be an implicit burden on an employee who fails to use the complaint system in place.").

132 Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

133 *See, e.g.*, Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) (finding that policies must be "reasonably calculated to end the harassment"); Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991) (breaking the analysis into two prongs—whether the policy was reasonable and whether it adequately deterred illegally discriminatory conduct).

approach.[134] Many courts agree that anti-harassment policies must be both "reasonably calculated to end the harassment"[135] and adequately deter illegally discriminatory conduct.[136] However, compliance with these procedures seems to have become more legally significant than a substantive analysis of the conduct they aim to prohibit.[137]

The development of the legal framework has followed the sociological concept of legal endogeneity, in which a law acquires meaning from the social arenas it seeks to regulate.[138] In the face of new laws or requirements, organizations adopt new procedures and policies to create symbolic compliance; this symbolic compliance becomes the institutional norm, which courts then associate with actual compliance.[139] Endogeneity has three phases: reference, relevance, and deference.[140] First, mere reference of organizational structures, like complaint procedures, reflects the extent to which the structure has become the norm in work environments.[141] The more reference is made, of course, the more a concept becomes part of case law, taking on more significance. This first stage was already in process by the time the Supreme Court decided *Meritor*, evidenced by the Court's brief discussion of anti-harassment policies as potential limit on liability in other cases.[142] In the second stage, a structure becomes relevant to a legal framework without being required as judges begin to consider the presence of structures as potentially indicative of compliance with the legal framework.[143] The relevance stage for anti-harassment policies corresponds with the decisions in *Ellerth* and *Faragher* when the Court found anti-harassment policies would "normally suffice" to satisfy the affirmative defense.[144] The final stage is deference, where "structures become so closely associated with rationality and nondiscriminatory treatment that judges no longer scrutinize their quality or evaluate

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134 *See* Grossman, *supra* note 23, at 4–5 (arguing that courts ignore the causes of harassment and the effectiveness of preventative measures, and instead reward employers who "pay lip service to" the legal framework, even if those employers maintain workplaces with perpetual harassment and discrimination).

135 *Katz*, 709 F.2d at 256.

136 *Ellison*, 924 F.2d at 882.

137 Grossman, *supra* note 23, at 4.

138 Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOCIO. 888, 890 (2011).

139 *Id.* at 898.

140 *Id.* at 893.

141 *Id.*

142 Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 62, 71–72 (1986).

143 Edelman et al., *supra* note 138, at 893–94.

144 Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765; Faragher v. City of Boca Raton, 524 U.S. 775, 808 (1998).

whether they actually operate to reduce discrimination."[145] Instead, judges give deference to the structure "irrespective of whether [it] actually protects employees from discrimination."[146] The end result is that employers—the subject of Title VII regulation—define the meaning of compliance with its terms.[147]

The final stage of deference has not been illustrated in any one Supreme Court decision,[148] but is apparent from the current state of Title VII claims.[149] At some point, Title VII was reduced to a single element: the presence of a superficial policy used to insulate the employer from liability. The statutory language didn't change, but the legal framework did. The courts' increased deference to anti-harassment policies is illogical in light of the increasing body of social science literature establishing that these policies are ineffective—and at times—harmful.[150]

A. Enforcement: Leaving the Policing to the Policed

As discussed above, many courts require anti-harassment policies to meet certain standards, but the deference to employers renders the standard virtually meaningless.[151] One problem with anti-harassment procedures is that they frame harassment as an interpersonal problem related to business operation.[152] The response

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145 Edelman et al., *supra* note 138, at 894.

146 *Id.*

147 Bisom-Rapp, *supra* note 23, at 65 (citing LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC COMPLIANCE 12–14 (2016)).

148 *But see* GREEN, *supra* note 98, at 74–75 (describing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 342 (2011) as the climax of organizational innocence).

149 The concept of "deference" is interesting here. The *Vance* Court declined to give *Chevron* deference to the EEOC's guidelines, which would have expanded employer liability and rewarded effective anti-harassment policies. Vance v. Ball State Univ., 570 U.S. 421, 451 (Ginsburg, J., dissenting); *see also* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (deferring to administrative agencies and their rulemaking power). Since then, courts have given more deference to employers' anti-harassment policies than the Supreme Court gave to the EEOC.

150 *See* Theodore L. Hayes et al., *Coffee and Controversy: How Applied Psychology Can Revitalize Sexual Harassment and Racial Discrimination Training*, 13 INDUS. & ORG. PSYCH. 117, 121–22 (2020) (describing at best the neutral effects of discrimination training); *see also* EEOC TASK FORCE REPORT, *supra* note 28, at 15–17; Durana et al., *supra* note 28, at 16–17. *See generally* Afroditi Pina et al., *An Overview of the Literature on Sexual Harassment: Perpetrator, Theory, and Treatment Issues*, 14 AGGRESSION & VIOLENT BEHAV. 126 (2009). Courts shouldn't have to turn to social science, however. It has become apparent as a matter of common knowledge that workplace harassment is a significant problem in America. Concluding that anti-harassment policies are ineffective at preventing harassment shouldn't be a substantial leap.

151 *See supra* notes 130–37 and accompanying text.

152 Edelman et al., *supra* note 138, at 899.

to harassment, like the harassment itself, is framed as a managerial concern to be handled by the employer.[153] So framed, judges feel that subjecting employers' policies to more scrutiny would be an unreasonable intrusion of the workplace.[154]

Since anti-harassment policies are internal documents, they are designed to protect the employer.[155] Accordingly, there is no incentive for employers to address the environment that allows harassment to continue, which is the root of the problem. Instead, anti-harassment policies address harassment on a complaint-by-complaint basis, and as long as each individual complaint was responded to reasonably, the employer has performed its obligations under Title VII.[156] This piecemeal approach is little comfort to the victim who continues to work in a hostile environment in between each "reasonably-handled" complaint.

1. Same Company, Different Outcomes: The Tale of CRST Expedited

One recent example focusing on individual harassment comes from the Northern District of Iowa, which held that an employer was not liable for the harassment of several female truck drivers by their male co-drivers, despite an ineffective policy that failed to address widespread harassment.[157] The workforce in *Sellars v. CRST Expedited, Inc.* was overwhelmingly male.[158] When male drivers were paired with

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153 *Id.*

154 *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 770 (1998) (Thomas, J., dissenting) ("Sexual harassment is simply not something that employers can wholly prevent without taking extraordinary measures—constant video and audio surveillance, for example—that would revolutionize the workplace in a manner incompatible with a free society.").

155 *See* Edelman, *supra* note 121. Grossman, *supra* note 23, at 14 describes the delicate balance employers face in discouraging harassment and disseminating information about the complaint procedure without encouraging reporting too strongly. The reason *not* to encourage reporting is that an employee's unreasonable failure to notify her employer of the harassment will ensure the employer avoids liability under *Ellerth-Faragher* so long as it had a reasonable policy. *Id.*

156 GREEN, *supra* note 98, at 109.

157 Sellars v. CRST Expedited, Inc., 385 F. Supp. 3d 803, 833 (N.D. Iowa 2019). The trucking company, CRST, was involved in multiple lawsuits for sex discrimination and harassment—in fact, much of the district court's decision in this case was based on a standard set out by the Eighth Circuit in another CRST sex harassment case. *See generally id.* The district court did not find any merit to the plaintiffs' argument that CRST's ineffective policy affected the company's liability. *Id.* at 837. Despite the numerous lawsuits facing the company for the same behavior, the court concluded that "it was not reasonably foreseeable that plaintiffs would continue to be harassed by [another] co-driver" after being un-paired from their initial harasser. *Id.*

158 *See Sellars*, 385 F. Supp. 3d at 808 (noting that of the 500 lead drivers employed by CRST, only 25 were female); *see also id.* at 808 n.2 (explaining that only 13% of all drivers in August 2016 were female).

female drivers, isolation and lack of supervision contributed to a toxic culture.[159] The employer recognized these risk factors—it had a specialized procedure detailing what should happen when female drivers were harassed by their male co-drivers.[160]

The *Sellars* court held that it would be unfair to hold the employer liable.[161] Circuit precedent required an employer's policy and response to be reasonably calculated to end harassment, but a policy that failed to end harassment could still be reasonably calculated to do so.[162] The court focused on the fact that female drivers were harassed by different male drivers each time, and that CRST had no knowledge as to the specific male driver's harassment before it occurred.[163] The plaintiffs' argument that CRST failed to create an environment free from harassment, in the judge's opinion, would amount to strict liability.[164]

The plaintiffs presented evidence that CRST's employee relations manager and the company's human resources department performed minimal investigation, rarely tried to contact witnesses more than once, and in some cases concluded investigations on the same day they were filed.[165] Harassment was pervasive and caused by several employees, who were rarely disciplined,[166] despite the employee relations manager's

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159 *Id.* at 831.

160 *See id.* at 810–11 (describing the policy). CRST's policy was concerning for many reasons. Most notably, it would remove the female driver when she complained of sex harassment—not her male harasser, who would often continue driving. *Id.* at 811. Drivers are paid per mile, so the victims had the choice of forfeiting much of their earnings for the trip or remaining in a hostile environment. *Id.* at 809, 812. There is an argument to be made that the existence of this more specialized section of the anti-harassment policy should not be used against CRST because courts should encourage such policies attempting to stop harassment, rather than punish employers when such policies are ineffective. This may be a good argument under tort law, which shares similar principles, but it clashes with the purpose of Title VII, which is to promote *effective* anti-harassment policies. *See* Martha Chamallas, *Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law*, 75 OHIO ST. L.J. 1315, 1330 (2014) ("When we examine the contrasting structural models of liability found in tort versus Title VII and remind ourselves of tort law's well-known propensity for insulating employers in employee suits for compensation, the wisdom of importing [tort] law [to Title VII] is immediately called into question.").

161 *Sellars*, 385 F. Supp. 3d at 837.

162 *Id.* at 832 (citing Engel v. Rapid City Sch. Dist., 506 F.3d 1118, 1125 (8th Cir. 2007)).

163 *Id.* at 834–35, 837.

164 *Id.* at 834–35. According to the court, policies need not deter *other* harassers from harassment—just those who have already been caught. *Id.* at 835–37.

165 Id. at 819, 821–26. The employee relations manager also admitted that the problem was not under control and even suggested putting cameras in the truck cabs.

166 *Id.* at 813–14. Generally, the "discipline" would be that the harasser's status would be changed to "male only" in the internal system, preventing him from working with female drivers. *Id.* at 814. Since that left him with 87% of drivers to work with, this can hardly be considered disciplinary action. *Id.* at 808 n.2.

admission that the problem of sex harassment was not under control.[167] Nevertheless, because CRST had a policy that it followed, it was protected from liability.

Policies that fail to remedy a company's toxic culture cannot deter any one of its employees from becoming a part of that culture. The Ninth Circuit took a similar view in *Anderson v. CRST, International, Inc.*, a sex-based harassment case against the same company involving remarkably similar facts.[168] Unlike the *Sellars* court, the *Anderson* court reversed the district court's order granting summary judgment to CRST, in part because the plaintiff presented evidence that CRST took no action to prevent future action.[169] The plaintiff in *Anderson* was harassed by her co-driver and the harassment ended when she was separated from him.[170] The court found that CRST could still be liable for a hostile work environment if its policies and procedures failed to deter harassment, regardless of whether the plaintiff's harassment stopped.[171]

B. Focusing on Individual Acts

When a court focuses on individual acts of and responses to harassment, it "misses the forest for the trees."[172] The nature of a hostile work environment claim is that a single act may not be severe enough to constitute discrimination, but that same act, if sufficiently pervasive, might be. If the severe and pervasive element of a hostile work environment claim cannot be dissected, dissecting liability based on a hostile work environment is illogical.

Not only are hostile work environment claims analyzed as a whole to determine the existence of a Title VII violation, but if a violation is found—and liability attaches—the damages for hostile work environment claims are considered under the standard for continuing violations, not discrete acts.[173] In *National R.R. Passenger Corp. v. Morgan*, the Court recognized that the discrete acts standard was inappropriate because the unlawful employment practice "cannot be said to occur on any particular day."[174]

Hostile work environment claims, therefore, are evaluated on the entire period of harassment—not individual acts—at every point in litigation except when attaching

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167 *Id.* at 836. She also suggested putting cameras in the trucks to deter male drivers from harassing female drivers. *Id.*

168 Anderson v. CRST, Int'l, Inc., 685 F. App'x 524, 526–27 (9th Cir. 2017).

169 *Id.*

170 *Id.*

171 *Id.*

172 Vance v. Ball State Univ., 570 U.S. 421, 457 (2013) (Ginsburg, J., dissenting).

173 Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 104 (2002). As long as a single act of harassing conduct falls within the statutory period required by Title VII, the victim can recover for the entire time he was harassed, even if some of those acts fell outside the 180- or 300-day filing limit. *Id.* at 117.

174 *Id.* at 115.

liability. This shift in thinking about harassment may be caused by the belief that discrimination is attributable not to employers, but to individual bad actors.[175]

C. Probability of Harassment

Work environments with harassment as pervasive as CRST may find it difficult to determine the exact cause of hostility; likely, it is systemic and responding to each act individually won't solve the problem. But a meaningful analysis of its policies, whether it expresses a commitment to carrying out those polices, and careful monitoring of its employees' interactions may help illuminate factors that are within its control to remedy.

1. Authority of the Harasser

Vance requires courts to make fact-specific inquiries into the authority a harasser has over his victim.[176] If a harasser does not directly have the power to take tangible employment action against the victim—warranting the *Ellerth-Faragher* framework—the authority he does have must still be evaluated, because it is easier for an employee to harass a subordinate due to the nature of the relationship.[177] An employer should expect that the dynamic of these relationships are likely to dissuade the victim from reporting harassment. The more authority a harasser has, the more likely unreported harassment is to occur.

A harasser may hold some degree of authority over his victim without being a *Vance* supervisor.[178] The more authority a harasser has, the more power he has over his victim, and the more likely it is that he was aided in harassing the victim by his

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175 Zimmer, *supra* note 98, at 585. *See generally* GREEN, *supra* note 98.

176 *Vance*, 570 U.S. at 445–46 ("[T]he jury should be instructed that the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent.").

177 *See id.* at 454 (Ginsburg, J., dissenting) ("Exposed to a fellow employee's harassment, one can walk away or tell the offender to 'buzz off.' A supervisor's slings and arrows, however, are not so easily avoided.").

178 Not recognizing the inherent power of influential coworkers could have devastating consequences. In classical music, for example, principals are often influential in hiring members when a seat opens in their section; a concertmaster has even more influence. But because musicians are often unionized, courts will view a concertmaster or section principal as a victim's coworker. Sex harassment is pervasive throughout classical music because prestigious musicians have tremendous influence in the classical music world and can ruin the careers of their victims. For a detailed account of this problem, see Anne Midgette & Peggy McGlone, *Assaults in Dressing Rooms. Groping During Lessons. Classical Musicians Reveal a Profession Rife with Harassment.*, WASH. POST (July 26, 2018, 12:00 PM), https://www.washingtonpost.com/entertainment/music/assaults-in-dressing-rooms-groping-during-lessons-classical-musicians-reveal-a-profession-rife-with-harassment/2018/07/25/f47617d0-36c8-11e8-acd5-35eac230e514_story.html [https://perma.cc/D9ZP-TZAZ].

authority.[179] Employers can easily recognize authority and should ensure that it does not go unchecked.

2. Nature of Employment

The nature of certain industries or workplaces can increase the likelihood that employees will be harassed.[180] Two situations that increase the probability of harassment are homogenous workplaces and employees who work in isolation.[181] In isolated environments, harassers can easily exploit their victims due to the lack of supervision and witnesses.[182] An additional complication arises when workplace organization is decentralized with few obvious means of communication between organizational levels.[183]

Low- and middle-wage jobs like manufacturing, construction, law enforcement, and janitorial work are traditionally male-dominated and have developed a "climate of tolerance and a culture of silence" around sex-based harassment.[184] Harassment is calculated to make women feel unwelcome in the industry.[185]

Sex harassment is also more likely to occur in workplaces dominated by one gender.[186] Even in industries that are traditionally female, harassment can be more

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179 The amount of authority an employee has also reflects the amount of trust an employer placed in him, and victims find it more difficult to speak out against a trusted employee. This amount of trust should be considered in determining what the employer knew. Employers probably have more contact with employees who have authority than with those who don't, giving them more opportunities to observe and correct unlawful conduct.

180 EEOC TASK FORCE REPORT, *supra* note 28, at 25–30 (discussing several risk factors that the EEOC considers "fertile ground for harassment").

181 *Id.* at 26, 29.

182 *Id.* at 29.

183 *Id.*; Durana et al., *supra* note 28, at 22.

184 Durana et al., *supra* note 28, at 27–28.

185 *See generally* Victoria L. Brescoll et al., *Hard Won and Easily Lost: Status of Leaders in Gender-Stereotype-Incongruent Occupations*, 21 PSYCH. SCI. 1640, 1641–42 (2010) (explaining that women's mistakes are judged more harshly in these settings than men's); Susan Chira, *The 'Manly' Jobs Problem*, N.Y. TIMES (Feb. 8, 2018), https://www.nytimes.com/2018/02/08/sunday-review/sexual-harassment-masculine-jobs.html [https://perma.cc/LR2C-QFSP] (describing blue-collar jobs as a "manly trifecta" because they pay a "breadwinner's wage, embod[y] strength and form[] the backbone of the American economy"). These jobs are more likely to be unionized, which adds another layer to the problem. Unions fight any disciplinary action, especially termination, which leads to harassers staying in their jobs—even if the employer *does* take remedial action against them. Marion Crain & Ken Matheny, *Sexual Harassment and Solidarity*, 87 GEO. WASH. L. REV. 56, 66–67, 79 (2019).

186 EEOC TASK FORCE REPORT, *supra* note 28, at 26, app. C at 84; Durana et al., *supra* note 28, at 17; Dana Kabat-Farr & Lilia M. Cortina, *Sex-Based Harassment in Employment: New Insights into Gender and Context*, 38 L. & HUM. BEHAV. 58, 68 (2014).

likely when men hold most positions of authority.[187] One study found that the more women were underrepresented in their workplaces, the more likely they were to be harassed.[188] Employers in male-dominant workplaces should have frequent contact with their employees to set the tone of acceptable conduct and observe unlawful conduct.

D. Duty of Employers

Title VII imposes an affirmative duty on employers to promote and correct harassment, which begins before harassment is reported. A reasonable employer should become aware of harassment before an employee formally complains about it. Formal reporting procedures can emotionally exhaust victims and decrease their productivity.[189] To avoid this, employers can take reasonable steps to discover harassment, which will shape how its employees see acceptable workplace conduct.

1. Leading by Example

Like any organization, workplaces take direction from their leadership—this includes values of workplace culture.[190] Employers should be firm in their commitment to promoting harassment-free environments and holding harassers accountable when that value is underscored.[191] When an employer's leadership practices the conduct it wants its employees to promote, that conduct will become the standard throughout the company.[192] A well thought-out anti-harassment policy is a good first step to meeting this goal, but employees will follow the example of leadership despite what is written in a policy. Employees entrusted with responsibility to lead a workplace should clearly communicate that the organization is committed to equality and inclusion, and the message should be as specific as possible to avoid appearing disingenuous.[193]

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187 Durana et al., *supra* note 28, at 5.

188 Kabat-Farr & Cortina, *supra* note 186, at 68. Interestingly, when men were underrepresented in the workplace, this study found that they were less likely to be harassed. *Id.* One explanation may be that underrepresentation of men makes their status seem more prominent, and thus more authoritative. *Id.*

189 *See, e.g.*, EEOC TASK FORCE REPORT, *supra* note 28, at 20–22 (describing the financial loss to employers caused by sex harassment, including decreased productivity by victims and other employees who observe misconduct); Cortina & Berdahl, *supra* note 28, at 483 ("[E]ven brief, subtly sexually harassing behaviors lead to impaired performance in victims.").

190 *See* EEOC TASK FORCE REPORT, *supra* note 28, at 31–32 (explaining that cultures of harassment "start[] at the top").

191 *Id.* at 31.

192 *Id.* at 31–32.

193 Rebecca K. Lee, *Beyond the Rhetoric: What It Means to Lead in a Diverse and Unequal World*, 71 STAN. L. REV. ONLINE 110, 119–20 (2018).

A related problem is how employers handle their "superstars," employees who bring in a lot of money for the employer and have institutional respect.[194] Employers may hesitate before disciplining superstars because of their financial value to the organization.[195] However, continuing to employ a superstar harasser without attempting to correct his behavior can cause financial loss to an employer.[196] Additionally, the frequency with which employees even observe harassment can have a negative effect on the culture of the workplace by creating more hostility.[197] Employment environments with passive leaders who fail to address or purposefully avoid taking responsibility for such acts tend to have higher rates of harassment.[198]

2. Recognizing Risk Factors and Investigating Complaints

Employers should be required to regularly assess their workplaces to recognize risk factors indicating that harassment may be likely to occur; when identified, employers should determine how to minimize them.[199]

When victims do complain about harassment, employers have an obligation to promptly investigate the allegation. The thoroughness of an investigation depends on the facts of each case. If a victim names several witnesses to the harassment who confirm the allegations, the harasser should be disciplined proportionate to the severity of his offense.[200] If a victim is unaware of witnesses, an employer should be obligated to interview other employees who worked at the time the incident took place.[201]

Because harassers often take advantage of isolation with a victim, many incidents will not have witnesses. When this happens, an employer cannot simply dismiss the allegation as uncorroborated and take no action.[202] When employees frequently work in isolation, employers should be held to higher standards for deterring harassment, as they are less able to manage employees' conduct.

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194 EEOC TASK FORCE REPORT, *supra* note 28, at 24.

195 *Id.*

196 *See, e.g.*, Cortina & Berdahl, *supra* note 28, at 477 (noting that "over 20 articles report that sexual harassment is associated with job dissatisfaction").

197 Junghyun Lee, *Passive Leadership and Sexual Harassment: Roles of Observed Hostility and Workplace Gender Ratio*, 47 PERSONNEL REV. 594, 598, 603 (2018).

198 *Id.* at 595, 597, 603.

199 At the very least, employers should take the steps suggested by the EEOC. The 2016 report, for example, gives solutions for each risk factor it identifies. EEOC TASK FORCE REPORT, *supra* note 28, at 84–88.

200 Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309 (5th Cir. 1987).

201 *But cf.* Hunt v. Wal-Mart Stores, Inc., 931 F.3d 624, 627, 630 (7th Cir. 2019) (finding an employer's failure to look for other witnesses reasonable, even when the victim told the human resources manager to ask other employees about her harasser's conduct).

202 *But see id.* at 626, 630 (finding it reasonable to discount an uncorroborated allegation of harassment, even when other allegations had been made against the harasser).

V. RESTORATIVE MEDIATION

As discussed in detail above, the current legal framework for evaluating harassment claims fails to achieve Title VII's goal of ending employment discrimination.[203] The shift in tone of the Supreme Court's sex harassment opinions indicate that it is unlikely to interpret the framework in a way helpful to plaintiffs.[204] The tendency to view discrimination as an individual problem—and the related view that systemic discrimination no longer exists—means that change is unlikely to come from district courts first hearing harassment claims.[205]

The biggest problem with the current framework is that it creates a loophole that allows harassment to go uncorrected. When courts get to the liability question in a sex harassment case, they have already determined that the plaintiff experienced harassment at work. Title VII does not impose liability on individuals, only employers, so if the plaintiff can't hold her employer liable, her case is over. The employer may have some incentive to review its policies to avoid spending money on litigation again, but without informed guidance the policies and procedures are likely to conform to the same standard of superficial compliance that has failed to address workplace harassment since Title VII was passed. Moreover, the victim leaves the process without closure or compensation. I address alternatives for compensation and mediation in this Part.

Remedies under Title VII should make the plaintiff whole, or as near to whole as possible.[206] Once courts find that sex harassment—or any type of unlawful discrimination—occurred, they should determine what remedies will make the plaintiff whole. If her employer cannot be held liable under the modern liability framework, then courts need to explore other remedies, particularly those that will address the hostile work environment of the entire workplace.

Federal courts have broad power to order remedies subject to certain limitations.[207] In the case of Title VII litigation, courts should use this power to compel mandatory mediation if they find a hostile work environment but fail to find a basis for imputing employer liability. Many commentators have criticized the use of mandatory mediation in Title VII cases,[208] and I don't argue that it should be used in place of litigation. Rather, mediation should only be used when ordinary standards of liability

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203 *See supra* Section III.A.

204 *See supra* Section III.B.

205 *See supra* Part III.

206 Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) ("It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers.").

207 *In re* Atl. Pipe Corp., 304 F.3d 135, 143 (1st Cir. 2002). These limitations are discussed in detail in Section V.D.1, *infra*.

208 Ann C. Hodges, *Employee Voice in Arbitration*, 22 EMP. RTS. & EMP. POL'Y J. 235, 237–41 (2018); Nuñez, *supra* note 114, at 506–12.

would otherwise prevent a successful claim. Mediation should be focused on restorative justice, a concept discussed below. So focused, compelled mediation serves both the ends of alternative dispute resolution and actively works to correct hostile work environments, thus advancing the aims of Title VII in a way current litigation does not.

A. Restorative Justice

Another important component of mediation is the opportunity for the victim to explain to her employer and her harasser, if she chooses, the effects the harassment caused. This is a critical piece missing from current anti-harassment procedures. Policies, procedures, and trainings are impersonal. Coworkers and their stories humanize the issue and explain the effects of harassment in a way a training manual never can. Harassers need to hear their victims—their coworkers—and they need to understand the pain they've caused. Only then will they stop their harassing conduct.

Employers also need to hear the pain harassment causes their employees. Supervisors and managers will be more likely to monitor the workplace for harassment if they understand how harmful it can be.[209] To effectively carry out these goals, mediation should be focused on restorative justice.

Restorative justice is a criminal justice ideology focused on healing all parties to a crime.[210] Restorative justice is better understood as a concept or a theory of criminal justice than one approach with one definition.[211] Central to each formulation, however, is the idea that criminal conduct causes harm to more than just the victim.[212] A community is harmed by criminal activity,[213] and communities often take an active role in an offender's rehabilitation to make up for any inadequate support in the past.[214] The offender is also a party to process; the community recognizes that it failed the

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209 The proposal in this Section is of course premised on the belief that people will *want* to change their conduct once they understand the pain they cause. Unless you believe that people are ambivalent to the pain they cause others—and I do not—then I think this is the only way to bring about real change. Harassers are going to go through their own pain during this realization, but then the workplace will finally be able to heal. Employers, unless they are ambivalent, will be moved to monitor the workplace because they have a more complete understanding of the harms of harassment and how they can prevent it.

210 LODE WALGRAVE, RESTORATIVE JUSTICE, SELF-INTEREST AND RESPONSIBLE CITIZENSHIP 31–41 (Routledge 2012).

211 *Id.* (exploring modern restorative justice practices); *id.* at 46–53 (describing how restorative justice shares similar goals with the traditional theories of criminal justice).

212 Lode Walgrave, *Towards Restoration as the Mainstream in Youth Justice*, *in* NEW DIRECTIONS IN RESTORATIVE JUSTICE 3, 5–6 (Elizabeth Elliott & Robert M. Gordon eds., Routledge 2011).

213 *Id.*

214 John Perry, *Introduction: Challenging the Assumptions*, *in* REPAIRING COMMUNITIES THROUGH RESTORATIVE JUSTICE 11–12 (John Perry ed., 2002).

offender as much as the victim, and the community attempts to heal the offender's brokenness.[215]

One common restorative justice model is victim-offender mediation, based on the idea that the victim and the offender have a shared interest in righting a wrong.[216] The emphasis is placed on reconciliation—victims tell offenders how the crime has affected them, and then "the parties may decide together what needs to be done about what happened and reach a mutually satisfying agreement."[217] Restorative justice also seeks to transform a negative experience—usually a crime—into a way to heal for all involved.[218] Every attempt is made to right the wrong; if the offender does not have the skills to do this alone, the community helps him.[219]

Though the results of restorative justice studies often vary depending on the type of crime committed, in most cases the experience has been profoundly meaningful to all parties involved. One study found that participants felt the process was fair 80–95% of the time.[220]

B. Applying Restorative Justice Principles to Sex Harassment Law

Restorative justice is meaningful for victims in criminal cases because it allows them to be directly involved with the outcome of the offense.[221] In a sex harassment case, the benefit to the victim lies in her involvement with institutional changes mean

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215 *Id.*; *see also* BRYAN STEVENSON, JUST MERCY 289 (2014). Bryan Stevenson writes beautifully about brokenness and healing in JUST MERCY:

> We are all broken by something. We have all hurt someone and have been hurt. . . . I guess I'd always known but never fully considered that being broken is what makes us human. . . . Sometimes we're fractured by the choices we make; sometimes we're shattered by things we would never have chosen. But our brokenness is also the source of our common humanity, the basis for our shared search for . . . healing. Our shared vulnerability and imperfection nurtures and sustains our capacity for compassion. We have a choice. We can embrace our humanness, which means embracing our broken natures and the compassion that remains our best hope for healing. Or we can deny our brokenness, forswear compassion, and, as a result, deny our own humanity.

Id.

216 MARGARITA ZERNOVA, RESTORATIVE JUSTICE: IDEALS AND REALITIES 8 (Routledge 2016).

217 *Id.*

218 MARIAN LIEBMANN, RESTORATIVE JUSTICE: HOW IT WORKS 25–26 (2007).

219 *Id.* at 27.

220 Kathleen Daly, *A Tale of Two Studies: Restorative Justice from a Victim's Perspective*, *in* NEW DIRECTIONS IN RESTORATIVE JUSTICE, *supra* note 212, at 155.

221 Jennifer J. Llewellyn et al., *Imagining Success for a Restorative Approach to Justice: Implications for Measurement and Evaluation*, DALHOUSIE L.J. 281, 294 (2013).

to end harassment at to change the harassment-ridden culture of a workplace and, if she still works there, repair her working relationships.

Any agreement reached during restorative justice mediation would be binding on all parties, as is typical for alternative dispute resolution ("ADR"). The agreement will effectively put the employer on notice that it needs to take affirmative steps to eliminate the culture of illegal conduct. Courts can retain jurisdiction over the case to ensure enforcement of the agreement and if any claims of discrimination are filed during that time, the agreement will serve as a presumption of knowledge. Thus, the agreement serves as an incentive for employers to perform more than superficial compliance with Title VII but does not hold them monetarily liable for harassment without legal knowledge.[222]

The type of restorative justice method employed should vary depending on the victim's preference. If the victim feels uncomfortable interacting with the harasser, the mediation should include the victim and the employer and then the employer and the harasser. If she does feel comfortable interacting with the harasser, then the mediation should include all three parties at once.

1. Failure of Strict Punishment

A goal of restorative mediation is to teach harassers why their conduct is wrong, not to punish them without explanation, a response likely to foster resentment and unlikely to change behavior. Even if a harasser is fired, the employer has only moved the problem elsewhere, a response not in line with Title VII's purpose of *ending* discrimination. People are likely to respond to corrective action more than punitive action, especially if they don't understand why they are being punished. Restorative justice will convey to harassers why their conduct deserves punishment and, hopefully, change their perceptions and behaviors.

C. Title VII's Conciliation Requirement

Title VII requires the EEOC to attempt to conciliate each case it handles and reach a settlement with the employer and victim before pursuing legal action.[223] While the requirement only applies in cases where the EEOC finds reasonable cause and works to correct the discrimination, which only happens in about fifteen to seventeen percent of charges the agency receives.[224] With the EEOC litigating a negligible percent of

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222 I say "legal knowledge" because the current standards encourage turning a blind eye and it is often difficult to argue that employers didn't actually know about harassing conduct. *See, e.g.*, Hunt v. Wal-Mart Stores, Inc., 931 F.3d 624, 629–30 (7th Cir. 2019) (finding an employer not liable for harassing the plaintiff, despite moving the harasser to her shift after a different employee complained about his behavior); Clehm v. Bae Sys. Ordnance Sys., Inc., 291 F. Supp. 3d 775, 788–89 (W.D. Va. 2017), *aff'd*, 786 F. App'x 391 (4th Cir. 2019) (holding that an employer was not liable for a hostile work environment, despite its knowledge of other instances of misconduct by the employee who harassed the plaintiff).

223 40. U.S.C. § 2000e-5(f); Mach Mining, LLC v. EEOC, 575 U.S. 480 (2015).

224 *All Statutes (Charges Filed with EEOC) FY 1997–FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/all-statutes-charges-filed-eeoc-fy-1997-fy-2020 [https://perma.cc/EU29-3XY8]. "Merit resolutions" are the sum of charges where the EEOC finds reasonable cause, regardless of the outcome of those charges (i.e. successful

discrimination cases,[225] it is hardly fair to deny individual plaintiffs' claims on the basis that Title VII maintains a preference for conciliation—a process specific to the EEOC. Nevertheless, Title VII's preference for "[c]ooperation and voluntary compliance" has become a common refrain.[226]

However, employers are not voluntarily complying with Title VII; instead, they respond to grievances on an individual basis and fail to address their own role in causing an environment where harassment continues. Neither does dismissing a plaintiff's case allow her to attempt conciliation with her employer—her case simply ends—so the focus on conciliation and voluntary compliance is misguided.

1. Properly Invoking Conciliation in Individual Claims

If courts want to continue to focus on Title VII's preference for conciliation, they should at least provide the parties with the means to conciliate. Without EEOC involvement, the court can impose mediation to give the victim an opportunity to explain where she believes her employer failed in addressing harassment. Consulting with the EEOC, or at least referencing publications that reflect its expertise, should be strongly encouraged.[227] The process needs to include some expert that will break the cycle of superficial compliance in anti-harassment policies.

A mediation agreement should serve as a presumption that the employer has knowledge of a hostile environment for a reasonable time after the conclusion of the

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conciliation, unsuccessful conciliation, private settlement). For the definition of each term, see *Definitions of Terms*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/definitions-terms [https://perma.cc/BC93-PATY] (last updated May 2020).

225 The EEOC litigated 144 substantive employment discrimination cases in 2019, or 1.15% of all employment cases heard by U.S. district courts. In 2020, the EEOC litigated 93 substantive cases, which comprised 0.82% of employment cases heard by the district courts. *See EEOC Litigation Statistics, FY 1997 Through FY 2020*, U.S. EQUAL EMP . OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/eeoc-litigation-statistics-fy-1997-through-fy-2020 [https://perma.cc/4UNX-W5GV]; *Table C-2—U.S. District Courts–Civil Statistical Tables for the Federal Judiciary*, U.S. CTS. (Dec. 31, 2020), https://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2020/12/31 [https://perma.cc/5LSM-B729] (data table on file with author). The employment cases may include disputes other than discrimination, which would increase the percentage of relevant cases the EEOC is involved in. However, even that increase is likely to be negligible.

226 *Mach Mining, LLC*, 575 U.S. at 486 (alteration in original) (quoting Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982)); *see also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Faragher v. City of Boca Raton, 524 U.S. 775, 805–06 (1998) ("Although Title VII seeks 'to make persons whole for injuries suffered on account of unlawful employment discrimination,' its 'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm." (first quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); and then quoting *Moody*, 422 U.S. at 417); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) ("For example, Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms.").

227 The EEOC is authorized to "education, technical assistance, and training relating to laws administered by the Commission" by 42 U.S.C. § 2000e-4(k).

mediation. The exact time will depend on each case and can be determined during the mediation.[228] The more risk factors that exist should extend the amount of time the employer is on notice, as they should understand the threat posed by those risk factors after successful mediation and thus have a duty to closely monitor their workplace.

If another employee brings a harassment claim against the employer within the time established by the mediation agreement, the employer should be presumed negligent. The presumption shouldn't attach until the mediation period concludes to avoid punishing the employer for making a good faith effort to comply with Title VII. This approach will force employers to address their role in causing harassment.

D. Compensation

In cases where courts find that the plaintiff proved harassment but could not prove the negligence standard for holding her employer liable, she should still be compensated for some of her injuries. The clearest method of doing this would be for Congress to amend Title VII to explicitly allow such a program and appropriate funds as needed. A second legislative method would be for Congress to better fund the EEOC, which may lead to more administrative conciliation attempts and obviate the need for lawsuits.

Legislative action is the clearest path to compensating victims from a source other than their employers. Title VII could be amended to include an additional monetary penalty on defendants who have been found liable for discrimination, which would contribute to funding mediation and compensation. The rest of the funding would be appropriated by Congress.[229]

Ideally, the EEOC should also be expanded so that their expertise can inform more conciliations, mediations, and revisions of anti-harassment policies. A better-funded EEOC may allow the agency to take on more charges and litigation, which would in many ways obviate the need for this proposal.

1. Restorative Justice Mediation Is Consistent with the Broad Powers of Federal Courts

Four main restrictions limit a court's ability to impose mandatory mediation:

> [A] district court's inherent powers are not infinite. There are at least four limiting principles. First, inherent powers must be used in a way reasonably suited to the enhancement of the court's processes, including the orderly and expeditious disposition of pending cases. Second, inherent powers cannot be exercised in a manner that contradicts an applicable statute or rule. Third, the

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228 Factors might include change of management during the process, the typical turnover rate in at the company, and the presence of risk factors identified in Section IV.D.2 and EEOC TASK FORCE REPORT, *supra* note 28, at 25–30.

229 Attaching money that likely comes, at least in part, form taxpayers is of course always a bold suggestion. I, for one, feel it's appropriate for Americans to compensate victims of harassment for the broken promise of Title VII.

> use of inherent powers must comport with procedural fairness. And, finally, inherent powers "must be exercised with restraint and discretion."[230]

In the context of Title VII claims, court-compelled mediation in the absence of liability meets all of these requirements. First, compelling mediation—thereby sending the case out of court—would facilitate the "orderly and expeditious disposition of pending cases" in much the same way as the current method of granting summary judgment.[231] Second, far from contradicting Title VII, compelling restorative justice mediation enhances its purpose and returns some force to the statute. Congress did not intend for Title VII to become a safe harbor for employers to invoke ineffective anti-harassment policies.[232] While mandatory mediation does not provide the remedies allowed for by Title VII, it is a step closer to making plaintiffs whole compared to the existing legal framework. Moreover, restorative justice acts in concert with the ultimate aim of Title VII—protection from discriminatory employment practices—by incentivizing employers to correct hostile work environments.

Third, as discussed above, procedural fairness is absent from the current legal landscape. Imposing mediation would balance the interests of employers and employees more effectively. Finally, using this remedy with restraint and discretion should be easy to comply with. Summary judgment can still act as the gatekeeper to filter out truly unmeritorious claims; hopefully, however, summary judgment will be granted less frequently when courts can keep cases off their dockets. This approach also has the benefit of protecting harassers from harsh punishment, which is another consequence of discrimination laundering.[233]

VI. CONCLUSION

Over the past few decades, women have been entering the workforce in record numbers.[234] Despite this improvement, disparities still exist between men and women in the workplace.[235] Title VII prohibits employers from discriminating on the basis of sex and it recognizes as discriminatory both quid-pro-quo harassment and hostile work environment harassment.[236] What many men have long seen as harmless flirtation or jokes, many women find offensive. While Title VII does not reach "genuine but innocuous differences in the ways men and women routinely interact with members

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230 *In re* Atl. Pipe Corp., 304 F.3d 135, 143 (1st Cir. 2002) (internal citations omitted).

231 *See* Bennett, *supra* note 85, at 690–93; Beiner, *supra* note 96, at 793.

232 Chuck Henson, *The Purposes of Title VII*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 221, 224 (2019).

233 *See generally* Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J.F. 85 (2018).

234 Exec. Order No. 13,506, 74 Fed. Reg. 11,271 (Mar. 11, 2009).

235 *Id.*

236 29 C.F.R. § 1604.11(a) (1980); *see also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

of the same sex and of the opposite sex,"[237] it can—and should—respond to changes in what society considers innocuous.

Just as society's views of what is acceptable and unacceptable change, the legal system adapts to meet new demands. New causes of action are developed or expanded, and courts adopt new interpretations of issues previously thought to have been settled. In the field of criminal law, some states have implemented restorative justice practices, which focus on the cause of crime in addition to determining the proper punishment.[238] Restorative justice offers promising developments in criminal law, as it is preferred by victims of crime and serves as an incentive for perpetrators of crime to accept responsibility.[239] Restorative justice can serve an important role in Title VII claims by ensuring employers listen to the experiences of their employees, that harassers understand the pain they have caused and take responsibility for it, and allowing Title VII to bring about change in employment discrimination law once again.

Currently, the crux of the negligence standard and the *Ellerth-Faragher* affirmative defense is whether an employer has an anti-harassment policy and whether the victim reported the harassment. At the time of *Ellerth* and *Faragher*, anti-harassment policies were new and thought to be an effective way to correct and prevent workplace harassment. However, recent studies of sex harassment have shown that anti-harassment policies and formal reporting measures fail to curtail workplace harassment. Courts need to reframe the standards of Title VII harassment claims to reflect how victims *actually* respond to harassment.

Once courts begin looking at sex harassment as an institutional injury, the next question is how to address it. If a court finds that a hostile work environment existed, but that an employer cannot be held liable, it effectively dismisses any harassment faced by a plaintiff and weakens Title VII. To preserve the force of Title VII, an employer cannot escape liability once an employee has proved an actionable claim. Since courts are reluctant to impose monetary liability on employers unless tangible action was taken against the plaintiff, other remedies should be explored. As part of the remedy, courts can organize face-to-face meetings between the employee and her employer, much like face-to-face meetings in ordinary restorative justice. Some forms of restorative justice involve community input. In sex harassment cases, the employer is the community. A plaintiff may not want to stay with her employer, but working with that employer to help other women avoid the harassment she faced is a powerful way of healing.

Restorative justice is appropriate in sex harassment claims because it is not just an individual who is hurt by the harassing conduct, but families, employers, and the national workforce. Restorative justice seeks to involve victims, perpetrators, and the

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237 Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

238 LAWRENCE W. SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE 12 (2007).

239 *Id.* at 8.

community affected by crime.[240] The same principles apply to fighting toxic workplace cultures.

Sex harassment law in the United States has progressed from Anita Hill's Senate testimony to Christine Blasey Ford's Senate testimony, but just like the Senate, courts only care about *appearing* to prevent sex harassment. Courts can advance Title VII law by loosening restrictions on employer liability and punishing ineffective anti-harassment policies that only appear to prevent harassment.

240 Annalise Buth & Lynn Cohn, *Looking at Justice Through a Lens of Healing and Reconnection*, 13 NW. J.L. & SOC. POL'Y 1, 3–4 (2017).